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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. OMAR DELGADO, Defendant and Appellant.	B283197 (Los Angeles County Super. Ct. No. TA085533)

APPEAL from a judgment of the Superior Court of Los Angeles County, Sean D. Coen, Judge. Affirmed and remanded with directions.

Matthew Missakian, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Omar Delgado was angry because his friend Gabriel Plascencia had been flirting with Delgado's girlfriend. One day in July 2006 Delgado walked up to Plascencia, shot him in the head and, while Plascencia lay on the ground, shot him in the chest. Julio Flores, a friend of both Delgado and Plascencia, witnessed the murder. Delgado fled to Mexico.

In March 2017, after his return to and arrest in California, a jury convicted Delgado of first degree murder and found true allegations he personally and intentionally discharged a firearm causing Plascencia's death. (Pen. Code, §§ 187, subd. (a), 12022.53, subds. (b)-(d).) The trial court sentenced Delgado to a prison term of 50 years to life.

Delgado argues that the trial court committed several prejudicial evidentiary errors and coerced a jury verdict and that the prosecutor engaged in misconduct. We affirm the conviction, but remand to allow the trial court to exercise discretion to dismiss or strike the firearm enhancements.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Delgado Kills Plascencia*

1. *The Party*

In the summer of 2006 Edwin Delgado (Edwin) overheard his brother Omar Delgado (Delgado) speaking with Delgado's girlfriend, Iris, by telephone. Edwin and Delgado were in Arizona, and Iris was in Southern California. Delgado was angry because Plascencia had been flirting with Iris.

Several weeks later Delgado and Edwin drove to Los Angeles and stayed with a friend in Lynwood. On July 7, 2006 they went to a party in Lynwood with Flores, Plascencia, and Daniel Renteria.

At some point during the evening, Delgado and Plascencia had a heated argument. Flores, Renteria, and Edwin saw the two men interacting, but they did not hear what Delgado and Plascencia said to each other. Renteria testified that Delgado and Plascencia spoke in raised voices and that the conversation was "kind of out of hand a little bit." Renteria said he and others had to intervene to calm the two men.

2. *Renteria*

Renteria left the party, returned to the motel where he was staying, and went to sleep. Later he received a call in which "they" (he could not remember who) stated, "Omar is going to do Gabriel." After receiving this call, Renteria contacted Plascencia and asked where he was. Plascencia told Renteria he was already home, in front of his aunt's house on Anzac Avenue in Watts. Renteria went back to sleep.

The next morning someone called Renteria and said Plascencia had been killed on Anzac Avenue. Renteria drove there, but found the area was "blocked." He drove back to Lynwood and saw Delgado sitting in his car. Renteria said to Delgado, "What did you do?" and "If you did, you fucked up." Delgado stated several times, "What are you talking about?"

Later that day, Detective John Skaggs interviewed Renteria. According to the detective, Renteria told him the second call Renteria received was from Jesus Cruz, known as Smiley, who said Delgado, whom he called Shadow, "did Gabriel."

Also according to Detective Skaggs, Renteria said he confronted Delgado, but Delgado did not respond.

3. *Flores*

Plascencia parked his red truck that evening in front of his aunt's house on Anzac Avenue and went with Flores to the party. Leaving the party soon after Renteria did, they drove to a drive-through fast food restaurant. While they were in the car, Plascencia got a call from Renteria, who wanted to know whether Plascencia was okay. Flores thought it was "strange" Renteria called.

After leaving the fast food restaurant, Flores noticed a car following him. Flores stopped next to Plascencia's parked truck, and the other car stopped behind him. Plascencia got out of Flores's car holding a hamburger and a drink. As Plascencia was standing between his truck and Flores's car, Delgado got out of the car that had been following them and approached Plascencia. Plascencia said to Delgado, "Hey, what's going on?" Without responding, Delgado pointed a gun at Plascencia, fired, and missed. Flores looked in the direction Delgado had fired. When he looked back, he saw Delgado shoot Plascencia in the back of the head and Plascencia fall to the ground. Delgado leaned over Plascencia and shot him again. Delgado returned to his car and left.

When police officers arrived, Flores told one of the officers he had seen the shooting and knew who the shooter was. Detective Skaggs interviewed Flores a few hours later. Flores, whom Detective Skaggs characterized as "forthright," described the series of events from the time he arrived at the party to the time the officers responded to the shooting. Flores explained at

trial that, although growing up he been taught not to snitch or talk to the police, he felt he had to tell the truth in this case because it was the right thing to do.

Flores admitted at trial he drank beer that evening and used "a little bit" of methamphetamine in the early morning hours to "sober up" before he went to work. A toxicologist called by Delgado testified that using alcohol and methamphetamine together could affect a person's perception, memory, and comprehension.

4. *Edwin*

Edwin and Delgado remained at the party after Renteria, Flores, and Plascencia left. Edwin testified that Delgado said he wanted Edwin to drive him to shoot Plascencia. When Edwin declined, Delgado left and took the car. Edwin called Renteria and told him Delgado was going to shoot Plascencia.

Edwin testified that when Delgado returned an hour later he had a revolver. Edwin took the weapon, which contained four empty shell casings and one live round, flushed the shell casings down the toilet, and gave the gun to one of his cousins.

Detective Skaggs interviewed Edwin on July 9, 2006. Edwin told the detective that Delgado and Plascencia had a "dispute" during the party and that Delgado took his shirt off to fight, but the situation calmed down. Edwin said Flores and Plascencia left the party together and, a few minutes later, Delgado followed. Edwin told Detective Skaggs that, when he asked Delgado where he was going, Delgado said, "Don't worry about it. I'll be right back." Twenty minutes later, Delgado returned. Edwin asked Delgado where he had been, but Delgado did not respond. Edwin also told Detective Skaggs that the

morning after the shooting Renteria confronted Delgado and said Delgado had "fucked up." Delgado responded angrily and "puffed up and show[ed] his muscles." According to the detective, Edwin said Delgado told Renteria, "It was personal. It was personal." At trial, however, Edwin denied he saw Renteria confront Delgado about Plascencia's death.

Meanwhile, between the shooting in July 2006 and the time of trial, Edwin's father died, and Edwin was diagnosed with schizophrenia. A forensic psychologist called by the People testified about a schizophrenic's ability to recall memories and to tell the truth. The psychologist stated a person can test the accuracy of a schizophrenic's memory by comparing his or her statements with known facts. Edwin's treating physician, called by Delgado, testified schizophrenia can affect a person's ability to recall and describe events that occurred before the onset of the condition. The physician also said she could corroborate any statements Edwin made about his history by reference to known facts.

B. *Ten Years Later, the Jury Convicts Delgado of Murdering Plascencia*

Law enforcement tried to find Delgado in Mexico for 10 years. In January 2016 officers arrested Delgado at his mother's home in Whittier. His first trial, in August 2016, ended in a mistrial because the jury could not reach a verdict. The second trial was in February and March 2017, and the jury found Delgado guilty of first degree murder. The trial court sentenced Delgado to a prison term of 25 years to life, plus 25 years to life for the firearm enhancement, for a total prison term of 50 years to life. Delgado timely appealed.

DISCUSSION

A. *The Trial Court Did Not Make Any Prejudicial Errors in Its Evidentiary Rulings*

Delgado argues the trial court abused its discretion in overruling his objections to the admission of several hearsay statements. In particular, Delgado claims error in the admission of (1) the statement by Edwin or someone else to Renteria that "Omar is going to do Gabriel"; (2) the statement by Edwin to Detective Skaggs that Delgado "took off his shirt to fight" Plascencia; (3) the statement by Edwin to Detective Skaggs that Delgado told him, "Don't worry about [where I am going], I'll be right back"; (4) the statement by Renteria to Detective Skaggs that Cruz called him and said Delgado "did Gabriel"; and (5) various statements by Renteria and Edwin about Delgado's responses when they asked him about Plascencia's murder. Delgado also contends the trial court abused its discretion in allowing Detective Skaggs to give an opinion about whether statements by Flores and Edwin before trial were consistent with their testimony at trial.

1. *Standard of Review*

We review for abuse of discretion the trial court's evidentiary rulings. (*People v. Powell* (2018) 5 Cal.5th 921, 951; *People v. Wall* (2017) 3 Cal.5th 1048, 1069.) An evidentiary error is reversible only where the defendant made a timely and specific objection and the error resulted in a miscarriage of justice. (Evid. Code, § 353;[1] see *People v. Sivongxxay* (2017) 3 Cal.5th 151, 178

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[1] Undesignated statutory references are to the Evidence Code.

["[t]he California Constitution [article VI, section 13] imposes upon this court an obligation to conduct 'an examination of the entire cause' and reverse a judgment below for error only upon determining that a 'miscarriage of justice' has occurred"]; *People v. Earp* (1999) 20 Cal.4th 826, 878 ["[w]e do not reverse a judgment for erroneous admission of evidence unless 'the admitted evidence should have been excluded on the ground stated and . . . the error or errors complained of resulted in a miscarriage of justice'"].) "[A]s a general matter, '"a 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error."'" (*People v. Blackburn* (2015) 61 Cal.4th 1113, 1146.)

2. *Any Error in the Admission of Renteria's Statement "Omar Is Going To Do Gabriel" Was Harmless*

Delgado argues the trial court abused its discretion by overruling his hearsay objection to Renteria's trial testimony that an unidentified caller told him, "Omar is going to do Gabriel." The trial court ruled the statement was admissible for the nonhearsay purpose of showing the statement's effect on Renteria. (See *People v. Clark* (2016) 63 Cal.4th 522, 562 ["'an out-of-court statement can be admitted for the nonhearsay purpose of showing that it imparted certain information to the hearer, and that the hearer, believing such information to be true, acted in conformity with such belief'"]; *People v. Livingston* (2012) 53 Cal.4th 1145, 1162 [evidence of a statement that caused

the witness to act in a certain way ‘“‘“is not hearsay, since it is the hearer’s reaction to the statement that is the relevant fact sought to be proved, not the truth of the matter asserted in the statement”’”].) The trial court ruled the evidence someone called Renteria and told him Delgado was going to “do” Plascencia explained why Renteria contacted Plascencia and asked him where he was and whether he was okay. (See, e.g., *Livingston*, at p. 1162 [“the fact that the statement was made . . . may have been relevant for the jury to understand why [the witness] and the others ran across the street”].) Consistent with this ruling, the trial court instructed the jury: “[I]n regards to the statement made on the phone, ‘Omar’s going to do Gabriel,’ that statement is being offered for the limited purpose of showing its effect on the listener, Mr. Renteria, not for the truth of the matter asserted. So you will consider it only for its effect upon the listener in that matter.”

Delgado argues that, even if the People sought to introduce evidence of the statement for the nonhearsay purpose of explaining why Renteria called Plascencia, why Renteria called Plascencia was irrelevant. “‘A hearsay objection to an out-of-court statement may not be overruled simply by identifying a nonhearsay purpose for admitting the statement. The trial court must also find that the nonhearsay purpose is relevant to an issue in dispute.’” (*People v. Riccardi* (2012) 54 Cal.4th 758, 814, disapproved on another ground in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216; see *People v. Montes* (2014) 58 Cal.4th 809, 863 [“[t]he nonhearsay purpose must also be relevant to an issue in dispute”].) Evidence Renteria received a call warning him that Plascencia was in danger was relevant to explain why Renteria called Plascencia in the middle of the night to check on him, even

though Renteria had just seen Plascencia a few hours before and had no other reason to call him. It also tended to corroborate Edwin's testimony that he called Renteria and Flores's testimony that Plascencia received a call from Renteria. As Delgado correctly points out, however, the People could have proven those facts without also introducing the hearsay content of the call identifying Delgado as the person who was going to "do" Plascencia. (Cf. *People v. Case* (2018) 5 Cal.5th 1, 32-33 [evidence the defendant bragged he was a bank robber and a convicted felon was relevant to explain what the person who heard the statement was "'doing and her motivation for doing it'" where her acts were otherwise "'going to be somewhat difficult to swallow'"].)[2]

But even if the trial court abused its discretion in overruling Delgado's hearsay objection to this statement, it is not reasonably probable the jury would have reached a result more

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[2] Delgado also argues the trial court should have excluded the evidence under section 352. By not objecting under section 352 at trial, however, Delgado forfeited the argument. (See § 353, subd. (a); *People v. Valdez* (2012) 55 Cal.4th 82, 138 ["[i]nsofar as defendant argues the evidence was inadmissible under . . . section 352 . . . defendant forfeited this argument by failing to object on this basis at trial"]; *People v. Panah* (2005) 35 Cal.4th 395, 492 ["[d]efendant's . . . section 352 claim is forfeited by his failure to have made this objection"].) Delgado's hearsay objection did not preserve an objection under section 352. (See *People v. Ervine* (2009) 47 Cal.4th 745, 777 ["hearsay objection did not preserve claim of undue prejudice"].) Although Delgado subsequently moved for a mistrial in part on the ground the statement "Omar is going to do Gabriel" was more prejudicial than probative, Delgado does not challenge the trial court's ruling on his motion for a mistrial.

favorable to Delgado had Renteria not testified about the (entire content of the) call he received. As stated, the trial court instructed the jury to consider evidence of the statement only for the limited purpose of its effect on Renteria. Absent a showing to the contrary, which Delgado has not made, we presume the jury understood and followed that instruction. (See *People v. Buenrostro* (2018) 6 Cal.5th 367, 431; *People v. Daveggio and Michaud* (2018) 4 Cal.5th 790, 821.) Indeed, the prosecutor did not argue to the jury the statement established Delgado's guilt.

Moreover, Edwin testified, without any limiting instruction, about the same phone call. Edwin stated that Delgado asked him "to drive him over to shoot [Plascencia]." Edwin stated that, after he refused and Delgado left without him, he "called [Renteria] from the cellphone saying [Delgado] was going to go over and shoot [Plascencia]." (See *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 415 [any error in admitting hearsay statement was harmless where another witness's "statements conveyed the same information"]; *People v. Thomas* (2007) 150 Cal.App.4th 461, 464 ["The trial court erred by admitting one hearsay statement, but the error was harmless because its content was the same as other properly admitted evidence."].)

Finally, the evidence Delgado killed Plascencia was overwhelming. Flores saw Delgado, whom he had known for years, shoot Plascencia. Plascencia's body was lying in the street next to his red truck and a cup from the fast food restaurant, consistent with Flores's testimony. In addition, Plascencia's gunshot wounds were consistent with Flores's description of how Delgado shot Plascencia. One bullet entered the left side of Plascencia's head and traveled left to right, back to front. Flores

testified Delgado stood right behind and "a little" to the left of Plascencia and shot him in the back of the head. Another bullet went through the middle of Plascencia's chest, through his right lung, and lodged in his lower back. Flores testified that, after Plascencia fell to the ground, Delgado leaned over and shot him again. And, consistent with Flores's testimony that Delgado shot Plascencia from behind, Plascencia did not have any defensive wounds.

The circumstantial evidence also pointed to Delgado. Edwin, although he did not witness the murder, saw Delgado express anger toward Plascencia, was asked to drive Delgado to kill Plascencia, and called Renteria to warn him Plascencia was in danger. Edwin also testified that Delgado returned 30 to 60 minutes later with a .38 caliber revolver and that Edwin found and disposed of four expended bullet casings.

Finally, there was evidence of Delgado's motive and consciousness of guilt. Delgado was angry Plascencia had been flirting with Iris. When Renteria confronted Delgado after Plascencia's murder, Delgado did not directly deny his guilt. And Delgado fled to Mexico and evaded efforts to capture him for almost 10 years. (See *People v. Gomez* (2018) 6 Cal.5th 243, 288 ["flight can show a consciousness of guilt"]; *People v. Powell* (2018) 6 Cal.5th 136, 169 [jury may "infer consciousness of guilt from [the defendant's] flight after the crime"].) Therefore, because the evidence of Delgado's guilt was overwhelming, any error in admitting the statement was harmless. (See *People v. Eubanks* (2011) 53 Cal.4th 110, 152 [any error in admission of hearsay evidence was harmless "in light of the overwhelming evidence" the defendant committed the murders]; *People v. Houston* (2005) 130 Cal.App.4th 279, 296 [erroneous admission of

hearsay is harmless where the evidence of guilt is overwhelming].)

3. *The Trial Court's Admission of Detective Skaggs's Testimony About What Flores, Edwin, and Renteria Told Him in 2006 Was Either Not Error or Harmless Error*

After Flores, Renteria, and Edwin testified and the trial court excused them, the prosecution called Detective Skaggs to testify in part about statements the three men made to him when he interviewed them in 2006. Counsel for Delgado objected:

"[Counsel for Delgado]: I don't want to be interrupting [the prosecutor] with every single question. It looks like we're going to have quite a few . . . hearsay statements from Mr. Flores and possibly other witnesses. I would ask the court to allow me to make a continuing hearsay and Sixth Amendment objection to these so I don't have to interrupt her over and over again while she's talking about what theses witnesses told [Detective] Skaggs.

"The Court: That's fine. The ruling is they're not hearsay. They're different depending on what comes out of the witness's mouth, because there were some prior consistent statements that [you] were challenging, and now there is prior inconsistent statements as well that have come forward. So they're being allowed in for different purposes, and I prefer the answer.

"[Counsel for Delgado]: I understand. It's okay if it's continuing?

"The Court: That's fine.

"[Counsel for Delgado]: I don't have to make it every . . .

"The Court: Yes."

a. *Flores's Statements to Detective Skaggs*

Detective Skaggs told the jury what Flores, shortly after witnessing the murder, told him about it, which was consistent with Flores's trial testimony. Delgado argues Detective Skaggs's testimony repeating hearsay statements by Flores was inadmissible under the hearsay exception for prior consistent statements.

Section 1236 provides: "Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with Section 791." Section 791 provides: "Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after: [¶] . . . [¶] (b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen."

The trial court did not abuse its discretion. When cross-examining Flores, counsel for Delgado implied Detective Skaggs had coached Flores on his trial testimony. Counsel for Delgado had asked Flores several times whether Flores met with Detective Skaggs in 2016, and Flores refused or was very reluctant to answer. Flores also admitted he had refused to meet with counsel for Delgado or defense investigators. Evidence of Flores's prior consistent statements was admissible to rebut the implied charge his trial testimony was influenced by improper coaching. (See *People v. Kopatz* (2015) 61 Cal.4th 62, 86 [prior consistent statements were admissible to rebut a charge the

witness fabricated his identification of the defendant after he saw the defendant's photograph in the paper]; *People v. Collins* (2010) 49 Cal.4th 175, 216 [prior consistent statements were admissible to rebut an implied charge the witness's testimony was based on information in a police report and coaching by the prosecutor rather than the witness's recollection].)

b. *Edwin's Statements to Detective Skaggs*

Detective Skaggs testified about two statements Edwin made during his 2006 interview. First, to rebut Edwin's trial testimony that he saw Delgado and Plascencia talking but not fighting at the party, Detective Skaggs testified Edwin told him Delgado "took off his shirt to fight" Plascencia. Second, regarding Edwin's trial testimony that Delgado wanted Edwin to drive him to shoot Plascencia, Detective Skaggs testified Edwin told him that, when he (Edwin) asked Delgado where he was going, Delgado said, "Don't worry about it. I'll be right back."

"'A statement by a witness that is inconsistent with his or her trial testimony is admissible to establish the truth of the matter asserted in the statement under the conditions set forth in . . . sections 1235 and 770.'" (*People v. Chism* (2014) 58 Cal.4th 1266, 1294; see *People v. Rices* (2017) 4 Cal.5th 49, 85 [a prior inconsistent statement is "admissible both as impeachment and for its truth"].) Section 1235 provides: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770." Section 770 states: "Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall

be excluded unless: [¶] (a) The witness was so examined while testifying as to give him an opportunity to explain or deny the statement; or [¶] (b) The witness has not been excused from giving further testimony in the action."

Delgado argues the two statements Edwin made to Detective Skaggs were inadmissible as prior inconsistent statements because Edwin did not have an opportunity to admit or deny them. Any error in the admission of Edwin's statements to Detective Skaggs, however, was harmless. Even without Edwin's 2006 statements to the detective, the evidence of Delgado's guilt was overwhelming. Moreover, Edwin had already testified at trial that there was "some type of an argument" at the party and that "Omar [Delgado] took his shirt off," although Edwin suggested at trial it was because "it was warm."

c. *Renteria's Statements to Detective Skaggs*

Renteria testified at trial that the morning after the party someone, perhaps Cruz, called him and said Plascencia was dead. Detective Skaggs subsequently testified Renteria told him that "Smiley [Cruz]" called and said "Shadow [Delgado] did [Plascencia]." The trial court ruled the statement was admissible as a prior inconsistent statement. Delgado argues the statements were consistent, not inconsistent.

"A statement is inconsistent [within the meaning of sections 1235 and 770] if it has '"a tendency to contradict or disprove the [witness's trial] testimony or any inference to be deduced from it."'" (*People v. Cowan* (2010) 50 Cal.4th 401, 502.) '"'The 'fundamental requirement' of section 1235 is that the statement in fact be *inconsistent* with the witness's trial testimony." [Citation.] "Inconsistency in effect, rather than

contradiction in express terms, is the test for admitting a witness'[s] prior statement.'"'" (*People v. Homick* (2012) 55 Cal.4th 816, 859; see *In re Bell* (2017) 2 Cal.5th 1300, 1307 ["[w]hile . . . section 1235 does not require an express contradiction between the testimony and the prior statement, it does require inconsistency in effect"].)

Here, the two statements are more consistent than inconsistent. The additional fact Detective Skaggs's testimony supplied, that Cruz identified Delgado as the killer, was consistent with Renteria's testimony that Cruz told him Plascencia was dead. The statement that Delgado killed Plascencia might have been inconsistent with Renteria's trial testimony if, for example, Renteria had testified Cruz identified someone other than Delgado as the perpetrator. But he did not.

Any error, however, was harmless. As discussed, the evidence of Delgado's guilt was overwhelming. It is not reasonably probable that, had the jurors not heard the statement Detective Skaggs attributed to Renteria that Cruz said Delgado "did" Plascencia, they would have returned a verdict more favorable to Delgado.

d. *Delgado's Responses When Renteria Confronted Him*

The jury heard three versions of Delgado's response when Renteria confronted him. Renteria testified at trial he confronted Delgado, and Delgado said, "What are you talking about?" Detective Skaggs testified at trial, however, that in 2006 Renteria told him that, when he confronted Delgado, Delgado did

not respond.[3] And although Edwin testified at trial he did not see Renteria the morning after Plascencia was killed, Detective Skaggs testified that in 2006 Edwin told him that, when Renteria confronted Delgado, Delgado said, "It was personal. It was personal."

Delgado argues these prior inconsistent and inculpatory statements were inadmissible because Renteria and Edwin did not have an opportunity to explain or deny them. Again, however, given the overwhelming evidence of Delgado's guilt, any error was harmless.

4. *Skaggs's Testimony About Whether Statements by Flores and Edwin Were Consistent*

Detective Skaggs testified that he met with Flores in 2016 to review his testimony and to ask what he remembered about the murder and that Flores's statements were "essentially consistent" with what he said in 2006. Detective Skaggs also stated Edwin's testimony in a prior proceeding and Edwin's statements in an interview with the detective and a prosecutor in November 2016 were consistent with Edwin's testimony at trial.

Delgado argues Detective Skaggs's testimony "was improper for two reasons: 1) a jury does not need an expert to help it decide whether or not two statements are consistent; and 2) the prior statements/testimony were not in evidence. This improper expert opinion allowed the prosecution to bolster the credibility of its key witnesses." Delgado forfeited these arguments, however, by failing to object to Detective Skagg's testimony. And, contrary to Delgado's assertion, the fact that the

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[3] The trial court gave a jury instruction on adoptive admissions.

trial court overruled prior hearsay objections did not make it futile for Delgado to object to Detective Skaggs's testimony that the statements by Flores and Edwin were consistent. The trial court did not criticize counsel for Delgado for making objections, nor had the court suggested additional objections would be unwanted or unnecessary. (See *People v. Seumanu*, *supra*, 61 Cal.4th at p. 1320 ["the circumstances in no way suggest an objection . . . would have found an unsympathetic jurist"]; *People v. Boyette* (2002) 29 Cal.4th 381, 432 ["[a]lthough it is theoretically possible a trial court could be so biased against a defendant—as evidenced by prior rulings—that an appellate court might reasonably conclude further objections would have been futile, such is not the case here"]; see also *People v. Jackson* (2016) 1 Cal.5th 269, 349 ["[a] court will excuse a defendant's failure to object only if an objection would have been futile or if an admonition would not have cured the harm caused by the misconduct"].) In any event, even if Delgado had preserved his arguments, any error was harmless. Detective Skaggs's testimony on this point was very brief, the prosecutor did not argue this evidence to the jury, and it is not reasonably probable the result would have been more favorable to Delgado had the court excluded the detective's testimony on the relatively minor point.

B. *The Prosecutor's Misconduct Does Not Require Reversal*

Delgado argues the prosecutor committed misconduct "by describing parts of Flores's 2006 statement which were not in evidence and assuring the jury the entirety of his statement was

consistent with his trial testimony." Delgado's description of what occurred at trial is accurate, but it does not justify reversal.

During closing argument, counsel for Delgado identified areas of Flores's testimony that he contended were inconsistent. In support of his argument, counsel played for the jury two excerpts from Flores's 2006 recorded interview with Detective Skaggs. In rebuttal, the prosecutor argued: "You're not getting the full story, and that's what happened here. This is a long interview, and you're hearing snippets. The full story is over the entire interview, but it's consistent with what he testified to." The trial court overruled counsel for Delgado's objection that the prosecutor's argument was "outside the scope of the testimony." The trial court instructed the jury that, "as jurors in this matter, you are judges of the facts of the case." The prosecutor continued: "[Flores] never said anyone else committed the murder. He never said anybody else was in the car but him and [Plascencia]. He never said anything other than a revolver was being used. He never said any more or less than three shots were fired . . . . So we're talking about the totality of the evidence in comparison. Not picking out little pieces."

"A criminal prosecutor has much latitude when making a closing argument." (*People v. Seumanu*, *supra*, 61 Cal.4th at p. 1330; see *People v. Collins*, *supra*, 49 Cal.4th at p. 230 ["the prosecutor 'enjoys wide latitude in commenting on the evidence'"]; *People v. Hamilton* (2009) 45 Cal.4th 863, 928 [same].) "In particular, '[r]ebuttal argument must permit the prosecutor to fairly respond to arguments by defense counsel.'" (*People v. Reyes* (2016) 246 Cal.App.4th 62, 74.) A prosecutor, however, may not engage in misconduct. (*People v. Jackson* (2016) 1 Cal.5th 269, 349; see *People v. Duff* (2014) 58 Cal.4th 527, 568 [under

California law, "'[a] prosecutor commits misconduct when his or her conduct either infects the trial with such unfairness as to render the subsequent conviction a denial of due process, or involves deceptive or reprehensible methods employed to persuade the trier of fact'"].)

An appellate court will not "'"lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.'" (*People v. Dykes* (2009) 46 Cal.4th 731, 772; accord, *People v. Adams* (2014) 60 Cal.4th 541, 577.) Under federal law, prosecutorial misconduct requires reversal only "if it is so '"'"egregious"'"' as to render the trial 'fundamentally unfair' under due process principles." (*People v. Caldwell* (2013) 212 Cal.App.4th 1262, 1269.) Under state law, a judgment of conviction will be reversed based on prosecutorial misconduct "'only when, after reviewing the totality of the evidence, we can determine it is reasonably probable that a result more favorable to a defendant would have occurred absent the misconduct.'" (*People v. Williams* (2013) 218 Cal.App.4th 1038, 1073; see *People v. Fernandez* (2013) 216 Cal.App.4th 540, 564.)

The prosecutor committed misconduct by telling the jurors that, had they heard Flores's entire 2006 interview with Detective Skaggs (which they did not hear), they would have found it was consistent with Flores's trial testimony. (See *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 95 ["[a] prosecutor engages in misconduct by . . . referring to facts not in evidence"]; *People v. Ellison* (2011) 196 Cal.App.4th 1342, 1353 [same].) The prosecutor's comments, however, did not render Delgado's trial fundamentally unfair, nor is it reasonably probable the jury would have reached a verdict more favorable to Delgado had the

prosecutor not made the improper statements. The prosecutor's comments on this point were relatively brief, and the trial court immediately admonished the jurors they were the judges of the facts. (See *People v. Tate* (2010) 49 Cal.4th 635, 688-689 ["given the fleeting nature of the prosecutor's remark, the court's admonition to the jury to disregard it was sufficient to cure any harm"].) The trial court also instructed the jurors pursuant to CALCRIM No. 200, "It is up to all of you, and you alone, to decide what happened, based only on the evidence that has been presented to you in this trial," and pursuant to CALCRIM No. 222, "Nothing that the attorneys say is evidence." (See *People v. Cash* (2002) 28 Cal.4th 703, 734 ["[e]ven if we were to assume there was some impropriety in the prosecutor's argument, it was cured when the trial court instructed the jury with the standard admonition that argument is not evidence"].)

C. *The Trial Court's Instruction to the Jury To Continue Deliberating Was Not Coercive*

The jurors had deliberated for less than two hours when they wrote a note to the court stating, "We are only at eleven to one. Please advise how to proceed." The trial court responded by telling the jurors: "[Y]ou all received this matter at 3:30 p.m. yesterday, you started deliberations at about 9:15 a.m. this morning, and this request was made—or this question was about 10:40 a.m. You have absolutely not deliberated long enough in this matter. I will invite you all to continue deliberations." Delgado argues that, by giving this response, the trial court "exerted undue pressure on the lone minority juror and sent an unmistakable message that the holdout juror should change his or her vote and come in line with the majority."

Delgado's argument lacks merit. "Coercion occurs where 'the trial court, by insisting on further deliberations, expresse[s] an opinion that a verdict should be reached.'" (*People v. Peoples* (2016) 62 Cal.4th 718, 783; accord, *People v. Reed* (2018) 4 Cal.5th 989, 1015.) Merely telling the jurors they have not deliberated long enough is not coercive. (See *People v. Lucas* (2014) 60 Cal.4th 153, 328 [trial court's comment that the "'[t]he length and complexity of this case . . . are such that I would ask you to deliberate a little further'" was not coercive], disapproved on other grounds in *People v. Romero and Self* (2015) 62 Cal.4th 1, 53; *Peoples*, at p. 783 [trial court's comment "that 21.5 hours of deliberation was a 'drop in the bucket'" was not coercive]; *People v. Gill* (1997) 60 Cal.App.4th 743, 748 ["[t]here was no error on the court's part in advising the jury that it had not deliberated very long"].) The trial court here instructed the jury to continue deliberating and did not explicitly or impliedly single out or comment on any one juror or group of jurors. (See *People v. Butler* (2009) 46 Cal.4th 847, 885 ["[n]othing in the court's comments tended to dissuade any juror from maintaining his or her position"]; *People v. Pride* (1992) 3 Cal.4th 195, 265 ["[t]he court avoided any comment on the status of the [11-1] vote and strongly suggested it was irrelevant"].) Moreover, the court had previously instructed the jurors "[e]ach of you must decide the case for yourself" and "do not change your mind just because other jurors disagree with you." (See *Reed*, at p. 1016 [pre-deliberation instructions "adequately conveyed that jurors . . . should not acquiesce in a verdict with which they did not agree"].)[4]

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[4] Delgado argues the cumulative effect of the trial court's claimed errors requires reversal. There is, however, no

D. *Remand Is Appropriate for the Trial Court To Exercise Discretion Whether To Strike or Dismiss the Firearm Enhancement*

As stated, the trial court imposed a consecutive term of 25 years to life for personally and intentionally discharging a firearm and proximately causing a person's death. (Pen. Code, § 12022.53, subd. (d).) The trial court also imposed and stayed execution of the 10-year firearm enhancement under Penal Code section 12022.53, subdivision (b), and the 20-year firearm enhancement under Penal Code section 12022.53, subdivision (c). At the time, Penal Code section 12022.53, subdivision (h), prohibited the court from striking the enhancements under that statute. (See *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1127; *People v. Palacios* (2007) 41 Cal.4th 720, 726; *People v. Sinclair* (2008) 166 Cal.App.4th 848, 853.) The Legislature, however, has since amended Penal Code section 12022.53, subdivision (h), to give the trial court discretion to strike the firearm enhancements in the interest of justice. (See Sen. Bill No. 620 (2017-2018 Reg. Sess.) § 1.)

Delgado argues, the People concede, and we agree the amendment to Penal Code section 12022.53, subdivision (h), applies retroactively to defendants, like Delgado, whose appeals

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reasonable probability that, absent those purported errors, individually or cumulatively, Delgado would have obtained a more favorable result. (See *People v. Abel* (2012) 53 Cal.4th 891, 936 ["there is no reasonable probability the identified errors had any effect on the outcome of the trial"]; *People v. Cole* (2004) 33 Cal.4th 1158, 1235-1236 ["'We have either rejected on the merits defendant's claims of error or have found any assumed errors to be nonprejudicial. We reach the same conclusion with respect to the cumulative effect of any assumed errors.'"].)

are not final on the law's effective date. (See *People v. Hurlic* (2018) 25 Cal.App.5th 50, 56; *People v. Chavez* (2018) 22 Cal.App.5th 663, 712; *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1079-1080; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 424-425; *People v. Robbins* (2018) 19 Cal.App.5th 660, 679.) The People also concede Delgado "should be given a new sentencing hearing at which the trial court can consider whether to strike the firearm enhancement[s] pursuant to the discretion conferred" by the amendment to Penal Code section 12022.53, subdivision (h).

DISPOSITION

Delgado's conviction is affirmed. The matter is remanded to allow the trial court to exercise its discretion whether to strike the firearm enhancements under Penal Code section 12022.53, subdivision (h).

SEGAL, J.

We concur:

PERLUSS, P. J. FEUER, J.